UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RONALD F. PERRY, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 96-203-P-C***
	)	
RYDER TRUCK RENTAL, INC., et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON MOTIONS IN LIMINE

Before the court for decision at this time are a trio of motions *in limine* filed by three jointly-appearing defendants: The Perrier Group of America, Inc., Poland Spring Corporation and Great Spring Waters of America, Inc., all hereinafter referred to as the "Poland Spring defendants." The first motion (Docket No. 25) concerns the testimony of John R. Neal, the plaintiffs' designated expert on trucking industry standards, and testimony generally concerning compliance with federal motor carrier safety regulations. The second (Docket No. 28) concerns the testimony of Jarlath McEntee, the plaintiffs' designated engineering expert. The third motion (Docket No. 32) concerns photographs of the injured hand of one of the plaintiffs. For the reasons that follow, the first two motions are denied and decision on the third is reserved for trial.

I. Neal

The Poland Spring defendants seek to exclude the testimony of Neal on the ground that he is not qualified as an "expert" within the meaning of Fed. R. Evid. 702. According to the movants, the purpose of Neal's testimony is simply to state the plaintiffs' theories of liability with an air of authority.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. Exercising "broad discretion" in determining admissibility under Rule 702, the court first makes a determination as to whether the witness has the requisite qualifications to testify as an expert, and, if so, the court then "decides if the proposed subject matter of the expert opinion properly concerns 'scientific, technical, or other specialized knowledge'" within the meaning of the rule. *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 476 (1st Cir. 1997) (citations omitted). "Finally, the court performs a gatekeeping function to ascertain whether the testimony is helpful to the trier of fact, *i.e.*, whether it rests on a reliable foundation and is relevant to the facts of the case." *Id*. (citations omitted).

The plaintiffs have designated Neal as their "liability expert in the trucking field." Letter of Joseph L. Bornstein, Esq. to Martica S. Douglas, Esq. *et al.* dated September 30, 1996, Exh. 1 to Plaintiffs' Supplement to His [sic] Memorandum of Law, etc. (Docket No. 36), at 1. They have advised the defendants that Neal's testimony will involve the violation of trucking industry standards, specifically the failure to establish proper truck loading procedures, the failure to train and supervise properly the process of truck loading, the failure to inspect loaded trucks properly and the failure to comply with the federal regulation designed to protect against load-shifting. *Id*. at 1-2. According to his resumé, Neal's background includes approximately 13 years as the vice president in charge of safety and security with two trucking firms that primarily operated over-the-road tractor-trailers. Resumé of John R. Neal, appended to Plaintiffs' Memorandum of Law in Opposition to

Defendant Poland Spring's Motion in Limine Re: John R. Neal (Docket No. 33), at 1. He also served as the commander of a truck platoon, truck company and truck battalion in the Army, commanded three Air Force transport squadrons, as well as an Air Force transport group, a training wing and a transport wing — retiring from the military as an Air Force colonel. *Id*. His educational background consists of a bachelor's degree in military science as well as certain military training in the trucking field. *Id.*

By virtue of his background as a safety official in the industry, Neal plainly has the requisite qualifications to testify as an expert on truck safety. Likewise, his area of expertise consists of the kind of specialized knowledge contemplated by Rule 702. The real issue presented by this motion is whether Neal's testimony rests upon a reliable enough foundation to be of assistance to the jury. In that regard, the Poland Spring defendants contend that the crux of Neal's opinion is that the truck driven by plaintiff Ronald Perry had been loaded in violation of 49 C.F.R. § 393.104(b), which requires that cargo be "securely blocked or braced," or otherwise secured in conformity with other enumerated regulatory provisions, if the cargo might otherwise "shift sideways in transit." According to the Poland Spring defendants, Neal's testimony should be excluded because he has no experience with the kind of cargo at issue in this case — pallets of bottled water — and therefore has no basis for stating whether this cargo was in compliance with section 393.104(b). I disagree. While Neal's lack of specific experience with the transportation of bottled water may attenuate the probative value of his testimony, his general expertise in the field of trucking safety makes his assessment useful to the jury in understanding the evidence and/or making the necessary factual determinations. To hold otherwise would be to conclude that only an expert on the transportation of bottled water in pallets can meet the Rule 702 standard — a level of specialization not required

by the rule. *United States v. Alzanki*, 54 F.3d 994, 1006 (1st Cir. 1995).

The Poland Spring defendants further suggest that because Neal is not an accident reconstructionist or otherwise scientifically qualified to opine about the physical cause of the accident at issue in this case, he should not be permitted to state an opinion that the cause of the accident was the shifting of the freight in the truck. This is a closer question. Knowledge of safety standards in the industry is not the equivalent of expertise in the physics of when shifting cargo has caused a truck accident. On the other hand, Neal's general experience in the trucking industry may give him specialized knowledge of what is likely to happen when a load is not properly secured. The question of whether Neal may state an opinion about causation in this sense is best left to trial, where the court may better assess whether the plaintiffs have laid a proper foundation for permitting Neal to express such opinions.

The plaintiffs note that they have also designated Neal as an expert on damages and that they expect him to testify that plaintiff Ronald Perry is no longer qualified to drive a commercial vehicle under the applicable regulations because of his injuries. Given Neal's background in compliance with the regulations, I discern no basis in Rule 702 for excluding such opinion testimony.

II. Federal Motor Carrier Safety Regulations

The Poland Spring defendants also seek a ruling *in limine* that neither Neal nor any other witness may offer an opinion as to whether there has been a violation of the Federal Motor Carrier Safety Regulations. Conceding that Fed. R. Evid. 704 explicitly provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," these defendants nevertheless contend that such expert testimony would not "assist the trier of fact" and

is thus excludable under Rule 702. The movants' position is that such testimony would invade the province of the court, whose function it is to instruct the jury concerning the appropriate legal principles — including any applicable federal regulations.

The Law Court has recently and succinctly stated the applicable rule of substantive Maine law: "A violation of a safety statute is evidence of negligence and the court should instruct the jury as to the legal effect of any such violation." *Russell v. Accurate Abatement, Inc*., 1997 WL 225646 at *2 (Me. May 6, 1997) (citation omitted). By "safety statute," the Law Court was referring to any regulatory provision that has the force of law; in *Russell* the provision in question was a uniform building code adopted by a municipality. *Id*. at *1. Whether such a regulatory provision applies to the facts of a case is a question of law for the court. *Id*. at *2.

The pending motion does not ask the court to determine *in limine* whether the Federal Motor Carrier Safety Regulations, or any particular provisions contained therein, are applicable to the facts of this case. To the extent that such an issue remains in dispute at trial, it is a matter for the court to decide and not a proper subject for expert testimony. However, from this it does not follow that the Poland Spring defendants are entitled to a ruling prior to trial that no expert may testify concerning the extent of any defendant's compliance with these regulations. If the regulations apply, such testimony would clearly be relevant and of assistance to the trier of fact.

This is in accord with the case principally relied upon by the Poland Spring defendants, *Marx & Co. v. Diners' Club, Inc*., 550 F.2d 505 (2d Cir. 1977). *Marx* stands for the proposition that an expert witness improperly usurps the law-giving function of the judge in a jury trial when the witness opines as to the legal standards applicable to the case, or offers conclusions as to the legal significance of facts in evidence. *Id*. at 509-10; *see also Burkhart v. Washington Metro. Area*

Transit Auth., 1997 WL 252648 at *5 (D.C.Cir. May 16, 1997) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.") (citing *Marx*). There is no such infirmity when an expert witness testifies as to the the extent of compliance with the regulations, assuming the parties agree or the court determines the that regulations apply.

III. McEntee

In their second *in limine* motion, the Poland Spring defendants invoke Rule 702 in seeking to exclude the expert testimony of Jarlath McEntee. According to his resumé, McEntee is an engineer who holds a bachelor's degree from University College in Dublin, Ireland and a masters degree from Dartmouth College. Resumé of Jarlath McEntee, P.E., Exh. C to Plaintiffs' Memorandum of Law in Opposition to Defendant Poland Spring's Motion in Limine to Exclude Testimony of Jarlath McEntee ("Plaintiffs' Memorandum") (Docket No. 35). He served as a research assistant at Dartmouth for three years after receiving his masters, investigating the effects of steam condensing on cooling water sprays in boiling water reactors. *Id*. He then worked for five years as a design engineer, involved in the design, analysis and construction of engine and refrigerator systems. *Id*. He has taught fluid mechanics, thermodynamics, strength of materials, computer applications in engineering and computer-aided design at Maine Maritime Academy. *Id.* Since 1994 he has served as a consultant on issues relating to mechanical engineering. *Id*.

The Poland Spring defendants seek to exclude McEntee's testimony because he has no background in accident reconstruction, because he has no experience with tractor-trailers, and because he "has simply attempted to digest and regurgitate a large volume of technical information

fed to him" by plaintiffs' counsel. Poland Spring Defendants' Motion *In Limine* to Exclude Testimony of Jarlath McEntee with Incorporated Memorandum (Docket No. 28) at 4. According to the movants, McEntee simply lacks the "knowledge, skill, experience, training, or education" required of an expert witness under Rule 702.

According to the plaintiffs, McEntee's testimony will concern the "kingpin" and "fifth wheel" of the tractor-trailer rig in question. The fifth wheel is mounted in the rear of the tractor; the kingpin on the trailer. Plaintiffs' Memorandum at 1 n.1. Together, they comprise the mechanism that couples the tractor-trailer together. *Id.* McEntee plans to testify that excessive "slop," or clearance between the kingpin and fifth wheel, and possibly movement of other mechanisms within the fifth wheel, caused one of two jolts to the tractor-trailer rig as it rounded a curve, which in turn caused the load in the trailer to shift. *Id.* at 2. McEntee further plans to testify concerning the mass and momentum of the shifting cargo, by way of stating his opinion that the force of this movement — rather than excessive speed — was the cause of the accident in question. *Id.*

In my view, McEntee's lack of experience in accident reconstruction and with tractor-trailers generally goes to the weight rather than the admissibility of his proferred expert testimony. *See Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1338 (1st Cir. 1988) (statistical expert in discrimination case); *Payton v. Abbott Labs*, 780 F.2d 147, 155 (1st Cir. 1985) (medical experts). His specialized knowledge of mechanical engineering principles is the kind of specialized knowledge contemplated by Rule 702, and this knowledge would be of assistance to the jury in assessing the possible causes of the accident even though McEntee's expertise lies in engineering principles rather than accident reconstruction.

The two cases relied upon by the Poland Spring defendants, *State v. Longley*, 483 A.2d 725

(Me. 1984), and *State v. Boutilier*, 426 A.2d 876 (Me. 1981), provide no authority to the contrary. In the latter case, the Law Court determined that the trial court abused its discretion under Rule 702[1] by permitting a state trooper — whose relevant specialized training consisted of a three-week course in accident investigation — to state an opinion about a vehicle's speed using a method that was at variance with the method specified in his training manual. *Id*. at 878-79. Although the Law Court observed that this expert witness's "training and experience leave a great deal to be desired," admission of his testimony was error not because of his training but because of his flawed methodology. *Id*. In *Longley*, the Law Court found a similarly-trained state trooper to be qualified as an expert in accident reconstruction, albeit as to a witness who also had attended a 30-hour course in basic accident reconstruction and who had extensive on-the-job experience in reconstructing accidents and then testifying about his work. *Longley*, 483 A.2d at 730. These cases suggest that duly trained accident reconstructionists are properly considered experts under Rule 702. They do not suggest that only accident reconstructionists can qualify as Rule 702 experts when the issue is the causation of an accident.

[1] M. R. Evid. 702 is identical to its federal counterpart.

IV. The Photographs

Finally, in their third motion, the Poland Spring defendants seek a ruling excluding from evidence a series of five photographs taken of the left hand of plaintiff Ronald Perry immediately following the accident giving rise to the lawsuit.[2] These photographs, taken at the hospital, show the hand both before and after two of its fingers were amputated by physicians. The Poland Spring defendants contend that this evidence is irrelevant, and thus excludable pursuant to Fed. R. Evid. 401 and 402, or, in the alternative, properly excluded because its probative value is substantially outweighed by the danger of unfair prejudice pursuant to Fed. R. Evid. 403.

The movants' position on relevance is that the jury need not see these photographs because there is no dispute that Ronald Perry's injuries were caused by the accident in question. I disagree. As the plaintiffs point out, Rule 401 defines relevance not in terms of whether the evidence goes directly to the issues disputed at trial, but whether the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Fed. R. Evid. 401. And, as the plaintiffs further point out, the advisory committee's note to Rule 401 makes clear that "[t]he fact to which the evidence is directed need not be in dispute." *Id.*, Advisory Committee's Note. In such circumstances, if the evidence is excludable the basis is one or more of the considerations set forth in Rule 403. *Id*. Moreover, the Poland Spring defendants do not suggest that the extent of the plaintiffs' damages is the subject of any stipulation, and so in that sense the photographs are highly relevant to issues the court must assume are disputed for trial.

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[2] The photographs are attached as Exhibits A through E to Poland Spring Defendants' Motion *In Limine* with Incorporated Memorandum of Law (Docket No. 32).

Nor am I able to conclude *in limine* that the photographs should be excluded as unfairly prejudicial under Rule 403. I agree that the jury is likely to view the evidence in question, which graphically displays the extent to which Perry's hand was permanently damaged by the accident, as favorable on a visceral level to the plaintiffs' position in the case. That, in itself, does not merit exclusion. "Virtually all evidence is prejudicial — if the truth be told, that is almost always why the proponent seeks to introduce it — but it is only unfair prejudice against which the law protects." *United States v. Pitrone*, 1997 WL 259714 at *8 (1st Cir. May 22, 1997) (citation omitted). "Evidence should function to help the jury reconstruct earlier events and then apportion . . . responsibility as the law may require and Rule 403 exists to facilitate that process, not impede it." *Id*. (citation and internal quotation marks omitted).

Lacking a full sense of what issues are genuinely in dispute and what other evidence the parties may present concerning Perry's hand injuries and the plaintiffs' damages in general, I cannot say at this stage in the proceedings that the probative value of the photographs is substantially outweighed by unfair prejudice to the movants. Although both sides of this *in limine* dispute cite case law supporting their respective positions, ultimately the determination requires an exercise of discretion and thus recourse to precedent is relatively unhelpful. The determination is best left to the trial judge, who "has a unique perspective which enables [him] to make assessments of this kind knowledgeably." *Id*. (citation omitted).

IV. Conclusion

For the foregoing reasons, the first two motions *in limine* of the Poland Spring defendants (Docket Nos.25, 28) are **DENIED** and decision on the third (Docket No. 32) is **RESERVED** for trial.

Dated this 5th day of June, 1997.

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David M. Cohen
United States Magistrate Judge